Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 85-445

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

PETER DEFAZIO, et al.,

Petitioners,

v.

THE CITY OF SPRINGFIELD BY AND THROUGH THE SPRINGFIELD UTILITY BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI SUBMITTED BY EUGENE WATER & ELECTRIC BOARD, CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, CLATSKANIE PEOPLES' UTILITY DISTRICT, AND SURPRISE VALLEY ELECTRIFICATION CORPORATION

[See inside cover for counsel.]

BEST AVAILABLE COPY

14 pp

JAY T. WALDRON,
Counsel of Record
MILDRED J. CARMACK
SCHWABE, WILLIAMSON,
WYATT, MOORE & ROBERTS
Suites 1600-1800,
Pacwest Center
1211 S.W. Fifth Avenue
Portland, Oregon 97204-3795
Telephone: (503) 222-9981

Attorneys for Above-Named Respondents

QUESTION PRESENTED

Whether the trial court abused its discretion, creating prejudice and requiring reversal, when it did not delay proceedings in order to allow intervenors time for extensive discovery even though (1) intervenors never identified any factual issues which required discovery and (2) the only evidence which they now contend should have been considered by the court in reaching its decision consisted of documents which were readily available and which petitioners could have obtained and placed before the court?

No. 85-445

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

PETER DEFAZIO, et al.,

Petitioners,

v.

THE CITY OF SPRINGFIELD BY AND THROUGH THE SPRINGFIELD UTILITY BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI SUBMITTED BY EUGENE WATER & ELECTRIC BOARD, CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, CLATSKANIE PEOPLES' UTILITY DISTRICT, AND SURPRISE VALLEY ELECTRIFICATION CORPORATION

ARGUMENT

Petitioners, who were appellants in the court below, did not argue to that

court that the participants lacked authority, under state law, to enter into the net billing agreements if, when properly construed, those agreements were contracts for the sale of power under which BPA rather than the participants bore the "dry hole risk." As construed by both the District Court and the Circuit Court of Appeals, that is precisely what the net billing agreements were.

Petitioners are now contending that the lower courts' construction of the agreements *might* have been wrong because the bond resolutions, referred to in those agreements, were not made part of the record. That occurred, they argue, because the district court refused to grant their request, when they intervened in the proceeding, to modify the trial management schedule to give them additional time for extensive discovery.

The bond resolutions are documents available to the public. Petitioners have not explained why, if they believed those documents were essential to a correct decision, they did not simply obtain copies and submit them for the district court's consideration.

Petitioners' counsel knew the deadlines in the trial management schedule on February 14, 1983 because on that date he attended the conference at which the management schedule was determined (Excerpt 1129). That schedule allowed until April 7, 1983 for the filing of responses to the motions for summary judgment upon which this case was ultimately decided (Petition, Appendix C). In other words, petitioners had more than seven weeks in which to obtain and place before the court documents which are readily available and which they now claim were essential to a correct decision. At

the expiration of that time, although they asked for a continuance and for massive discovery, they did not explain why they had not been able to obtain copies of the bond resolutions or even suggest that they had made any effort to do so (Excerpt 1015-1027).

The petition attempts to transform that series of events into an occasion for review by this Court when what actually occurred was a proper discretionary ruling by the trial court which, so far as the record shows, caused no prejudice whatsoever.

Petitioners' argument that there was no case or controversy is simply not supported by the record. Extensive briefing to the district court on the summary judgment motions revealed sharp disagreement among the parties over the proper construction of the net billing agreements and over the question of the

authority of the participants to enter into them, as well as on other matters. Both courts below acknowledged that the controversy was real. The posture of the case was both concrete and adversarial.

Petitioners' actual complaint is not that there was no real controversy, but only that the court, if it had received additional evidence, might have decided the controversy before it differently. Yet, as shown above, if that additional evidence was relevant the petitioners had ample opportunity to produce it.

In the absence of any showing that the provisions of the bond resolutions were relevant to the construction of those portions of the net billing agreements which determined the outcome of this case, there was no reason why the district court should not have proceeded, as it did, to enter its declaratory ruling.

When they entered this case petitioners were on notice of the management schedule which had been set by the court. The court was certainly entitled, when allowing permissive intervention, to require the intervenors to adhere to that schedule so as not to delay the litigation. They were specifically offered an opportunity to identify any issues of fact relevant to the summary judgment motions which might have required further discovery (Petition, Appendix D). Although they did ask for discovery, they identified no such factual issues.[1]

The petition for certiorari boils down to a complaint that the district court

---

[1]Each category of documents as to which petitioners sought discovery was described as relating to legal rather than factual issues. For the most part, with the exception of the bond resolutions, petitioners believed those documents would disclose opinions of other persons concerning legal issues (Excerpt 1015-1027).

abused its discretion in its management of the case. District courts have broad discretion both when ruling on requests to intervene, *Shump v. Balka*, 574 F.2d 1341, 1345 (10th Cir. 1978), and authorities there cited, and when ruling on discovery matters. *In Re Multi-Piece Rim Products Liability Lit.*, 653 F.2d 671, 679 (D.C. Cir. 1981), and authorities there cited. No abuse of that discretion has been shown here.

CONCLUSION

Petitioners have not shown that the district court abused its discretion in this case. No other issue is presented.

The petition for certiorari should be denied.

Respectfully submitted,

SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
JAY T. WALDRON
MILDRED J. CARMACK

By: _____
Jay T. Waldron
Counsel of Record for
Above-Named Respondents